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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 17737

FIFTH STREET BUILDING, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA,
Respondent.

STATEMENT IN SUPPORT OF JURISDICTION.

The appellant, Fifth Street Building, a corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344, sub-section (a) of Title 28 of the United States Code, reading, to the extent relevent here, as follows:

"Sec. 344(a). Final judgment or decree in any suit in the highest court of a State in which a decision could

> be had • • • where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of California, the validity of which has been sustained by the final decree and judgment of the Supreme Court of the State of California, the highest court of said State, as not being violative of or repugnant to the Constitution and laws of the United States is the "California Bank and Corporation Franchise Tax Act", California Statutes 1929, p. 19, as Amended by California Statutes 1935, pp. 959, 995, 1245 Deering's General Laws, 1937, Act 8488. The pertinent provisions thereof are:

> "• • • (3) CORPORATIONS OTHER THAN FINANCIAL DOING BUSINESS IN THIS STATE TO PAY TAX: MINIMUM TAX. With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax • • •".

The construction of said California Bank and Corporation Franchise Tax Act by said Supreme Court of the State of California was pursuant to and based upon the construc-

tion placed upon the Act of Congress of the United States of June 18, 1934, 28 U. S. C. A., Sec. 124(a), by the said Supreme Court of the State of California, and was repugnant to said Act. The pertinent provisions of said Act of Congress are:

> "Any • • • trustee, • • • appointed by any United States Court who is authorized by said Court to conduct any business, or who does conduct any business, shall from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

The construction placed upon the provisions of the *Act of Congress* of June 18, 1934, 28 U. S. C., Sec. 124(a), by the Supreme Court of California, by reason of which it was held that the California Bank and Corporation Franchise Tax Act imposed a franchise tax on a trustee in bankruptcy, is believed to be repugnant to Article I, Section 8, Clause 1 of the Constitution of the United States, and repugnant to Amendment X of the Constitution of the United States.

The *California Bank and Corporation Franchise Tax Act*, as construed by the Supreme Court of the State of California is believed to be repugnant to Article I, Section 8, Clause 1 of the Constitution of the United States; to Amendment X of the Constitution of the United States and to said Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a).

The pertinent provisions of said Article I, Section 8, Clause 1, United States Constitution, are as follows:

> "The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The provisions of Amendment X of the Constitution of the United States are as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final decree and judgment of the Supreme Court of the State of California, which is now sought to be reviewed was December 5, 1941. Appellant's Motion for Rehearing was denied on December 31, 1941. The time for taking the appeal began to run on the date of the denial of said Motion for a Rehearing, to-wit, December 31, 1941.

The date on which the application for appeal was presented and the appeal allowed was February 28, 1942.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellant may bring its appeal within three months after the entry of the decree of the Supreme Court of the State of California.

D.

Nature of Case and Rulings Below.

On December 30, 1934, Walker's, Inc., a California corporation, filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California, Central Division, and was thereupon adjudged a bankrupt. Thereafter, Wm. H. Moore, Jr., was duly appointed trustee in said bankrupt estate, and remained said trustee during the period in controversy herein.

During the period in controversy herein, said trustee in bankruptcy, under authority of the aforesaid District

Court, carried on the business theretofore conducted by the bankrupt corporation (R. 1, 1.21, to R. 2, 1.6).

On March 9, 1937, the said trustee in bankruptcy filed a corporation franchise tax return under the provisions of Chapter 13 of the Statutes of California of 1929, known as the Bank and Corporation Franchise Tax Act, and paid a franchise tax for the year 1937 in the amount of $4,764.17 (R. 2, 1.8 to 1.24).

Said Franchise Tax Return was erroneously and illegally filed by said trustee, and the tax thereon was erroneously and illegally assessed and collected, and refund was erroneously denied (R. 5, 1.1 to 1.8).

The bankrupt corporation, Walker's, Inc., was duly discharged by the bankruptcy court in the year 1936, and during the period in controversy herein was privileged to and did exercise its franchise as a corporation *separate and independent from any business carried on by the aforesaid trustee in bankruptcy* (R. 4, 1.17 to 1.26). Said trustee in bankruptcy did not operate any business under the franchise granted by the State of California to Walker's, Inc. Said business was carried on by said trustee under and by virtue of the authority granted by the aforesaid District Court, and under and by virtue of the bankruptcy laws of the United States of America (R. 2, 1.26 to 3, 1.8).

The aforesaid trustee in bankruptcy duly filed a claim for refund of said 1937 franchise tax, which was denied (R. 3, 1.10 to 1.23) (R. 6 to 9).

Fifth Street Building, appellant herein, by order of the Federal Court, became the assignee of the claim for refund, and the owner of any right to a refund of the franchise tax paid by the trustee (R. 3, 1.25 to 4, 1.16) (R. 6 to 8).

The appellant herein sued for the recovery of the franchise tax paid by the trustee (R. 1 to 12). The respondent herein demurred (R. 15 to 21), the demurrer was over-

ruled (R. 22) and the respondent herein answered. The respondent herein in his answer did not deny any of the material allegations in the complaint (R. 13-14, 23, 24). Thereafter, motions for judgment on the pleadings were filed by both the appellant and respondent herein, and thereafter, to-wit, on September 17, 1940, judgment was rendered and entered in favor of the appellant herein and against the respondent herein for the refund of the aforesaid franchise tax (R. 23 to 25).

On September 28, 1940, said respondent appealed upon the judgment roll, to the Supreme Court of the State of California, from the said judgment of said Superior Court, by serving and filing in said Superior Court, his notice of appeal (R. 27 to 30).

On December 5, 1941, the Supreme Court of the State of California made and entered its judgment and decree wherein and whereby said Supreme Court reversed the said judgment and decree of said Superior Court. (19 A. C. 164; 119 Pac. (2d) 729).

On December 23, 1941, this appellant filed with the Supreme Court of the State of California, its Petition for Rehearing. Said Petition for Rehearing was, by said Supreme Court, denied on December 31, 1941.

The Act of Congress of June 18, 1934, was first mentioned by respondent in Points and Authorities in support of his Demurrer (R. 20, 1.2 to 1.26).

The effect and constitutionality of said Act of June 18, 1934, was argued by the appellant and the respondent, through their respective briefs, before the Supreme Court of California.

The Supreme Court of the State of California, in its judgment and decree, placed a construction upon the Corporate Franchise Tax Act of California based upon its

construction of the said Act of Congress of June 18, 1934.

The constitutionality of the said Franchise Tax Act of California, by reason of, and under the construction placed thereon, by the Supreme Court of the State of California in its said judgment and decree, was challenged by the appellant herein in its said Petition for Rehearing addressed to said Supreme Court of the State of California.

The Supreme Court of the State of California Held:

1. That the California Bank and Corporation Franchise Tax Act imposes a tax *upon the transaction of business* by a trustee in bankruptcy of a corporation, by reason of the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a).

2. That the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), makes the Franchise Tax which was made payable by the corporation under the California Bank and Corporation Franchise Tax Act, to be payable by the Trustee in Bankruptcy of such corporation by reason of the trustee, as such, conducting business of the bankruptcy estate under authority of the court, notwithstanding that the bankrupt corporation was itself operating under its franchise outside of bankruptcy.

3. That the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), gave to a trustee in bankruptcy of a corporation the status of a California corporation for the purpose of the California Bank and Corporation Franchise Tax Act as if he were a corporation, despite the fact that the corporation itself had previously and in the year 1936, been discharged from bankruptcy, and was during the year 1935 and thereafter in full possession and operation of its corporate franchise and was subject to a corporate fran-

chise tax for the privilege of exercising its corporate franchise during that year.

4. That the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), imposed a State tax upon the Trustee in Bankruptcy of a corporation, for the benefit of the State of California.

The Court stated in its judgment and decree:

> "The trustee, appointed after June 18, 1934, by a United States Court, conducted the business theretofore carried on by Walker's, Inc., then subject to the franchise tax as it would have continued to be had it not gone into bankruptcy." (19 A. C. 164, 165; 119 Pac. (2d) 729, 730.)

The Court further stated:

> "There is no need to amend the Bank and Corporation Franchise Tax Act to specify that a trustee in bankruptcy conducting the business of a corporation shall be subject to the tax as if he were a corporation in order to insure that an intervening bankruptcy will not interrupt the application of the tax." (19 A. C. 164, 166; 119 Pac. (2d) 729, 730.)

The Court further stated:

> "The Act of Congress already provides that state taxes are as applicable to such a business as if it were conducted by a corporation, and this gives to the trustee the status of a corporation for the purpose of the tax. That status is determined by Congress in the exercise of its plenary authority over the administration of a bankrupt's estate. * * * Congress creates the trusteeship, fixes the conditions of its existence and may provide, as in the act of 1934, that a trustee be regarded as of such a nature as to come within the range of state tax laws." (19 A. C. 164-167; 119 Pac. (2d) 129, 730.)

E.

Substantiality of Questions Involved.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit".

Hamilton v. *Regents of University of California*, 293 U. S. 245, 258; 79 L. ed. 343, 350.

The issue raised by the appellant's contention that the California Bank and Corporation Franchise Tax Act, as construed by the Supreme Court of the State of California, violates the taxing clause of Article I, Sec. 8, Clause 1 of the Constitution of the United States, and also Amendment X thereof, and the said Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), involves the power of the Congress of the United States to impose a State Corporation Franchise Tax upon a Trustee in Bankruptcy of a corporation, for the benefit of the State of California.

The California Bank and Corporation Franchise Tax Act provides that, excepting financial corporations, every corporation doing business in California, not expressly exempted from taxation, shall annually pay to the State, *for the privilege of exercising its corporate franchises* within the State, a tax known as the Corporate Franchise Tax. (California Statutes 1929, p. 19, as amended by Statutes 1935, pp. 959, 995.) Said California Statute does not lay a tax *on the conduct of business* by a corporation.

The Act of Congress of June 18, 1934, provides that a trustee in bankruptcy of a bankrupt corporation who con-

ducts any business is subject to State and local taxes which the bankrupt would be subject to by reason of the bankrupt doing those things which the trustee does.

The holding by the Supreme Court of the State of California and said California Corporation Franchise Tax Act subjected the Trustee in Bankruptcy to the payment of the California Corporation Franchise Tax by reason of the transaction of business by such trustee, renders the said California Act repugnant to the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), and renders said California Franchise Tax Act, as construed by said Supreme Court of the State of California, in contravention of and repugnant to Art. 1, Sec. 8, Clause 1 of the Constitution of the United States, and to Amendment X to the Constitution of the United States.

The construction placed upon the said California State Franchise Tax Act by the Supreme Court of the State of California, in holding that said State Franchise Tax Act, by reason of said Act of Congress of June 18, 1834, gave to the Trustee in Bankruptcy the status of a California corporation and made said trustee, by reason of his having transacted business in the State of California, liable for the payment of the California State Corporation Franchise Tax, makes said California State Franchise Tax Act unconstitutional and in violation of Article 1, Sec. 8, Clause 1 of the Constitution of the United States, and in violation of Amendment X of the Constitution of the United States, and is repugnant to the said Act of Congress of June 18, 1934, because it involves the power of the Congress to give to the Trustee in Bankruptcy the status of a California corporation for the purpose of the tax only, and then makes such trustee, by reason of such status, liable for the payment of a tax imposed by the State of California, for a privilege not exercised by the Trustee in Bankruptcy, for the benefit of the State of California.

This appeal presents questions, the determination of which is important in the administration of practically every corporation bankruptcy matter had in the several States, at least in every State which has a Corporation Franchise Tax Act which, as does the California Act, imposes a Franchise Tax upon a corporation *for the privilege of exercising its corporate franchises* within the State.

Under a State Franchise Tax Act which taxes a corporation *for the privilege of exercising its corporation franchise*, within the State, does the Act of Congress of June 18, 1934, 28 U. S. C., Sec. 124(a), make a Trustee in Bankruptcy, of a corporation, liable for the payment of a corporation franchise tax by reason of him, as such trustee, conducting the business of the bankruptcy estate? A decision by the Supreme Court of the United States in the present case will remove the uncertainty which now exists by reason of said Act of Congress of June 18, 1934.

If the Act of Congress of the United States of June 18, 1934, 28 U. S. C. A., Sec. 124(a), purports to give to a trustee the status of a California Corporation for the purpose of imposing a tax on such trustee for the benefit of the State of California, is said Act of Congress, as thus construed, repugnant to Article 1, Section 8, Clause 1 of the Constitution of the United States and repugnant to Amendment X of the Constitution of the United States?

F.

Cases Sustaining the Jurisdiction.

The Supreme Court of the United States has jurisdiction to entertain an appeal from the decision of the Supreme Court of the State of California on the ground that a State Statute, under the construction placed upon it by said Supreme Court of the State of California, violates certain clauses of the Constitution of the United States

and is repugnant to a certain Act of the Congress of the United States.

Merchants National Bank v. *Richmond*, 256 U. S. 635, 637; 65 L. Ed. 1135, 1137;
United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277, 280, 66 L. Ed. 234, 238;
Hanover Fire Insurance Company v. *Patrick J. Carr, County Treasurer*, 272 U. S. 494, 509, 71 L. Ed. 372, 380;
Ex Parte Worcester County Natl. Bank etc., 279 U. S. 347, 359; 73 L. Ed. 733, 738;
Fiske v. *Kansas*, 274 U. S. 380, 385; 71 L. Ed. 1108, 1111;
State Tax Commissioner v. *Van Cott*, 306 U. S. 511, 514; 83 L. Ed. 950, 952.

THEREFORE, the appellant, Fifth Street Building, a corporation, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344(a) of Title 28 of the United States Code.

Respectfully submitted,

CLARK J. MILLIRON,
Attorney for Appellant.

Of Counsel:
EDWARD L. COMPTON
of Flint & Mackay.

APPENDIX "A".

SUPREME COURT OF CALIFORNIA.

L. A. 17737.

FIFTH STREET BUILDING

v.

McCOLGAN, Franchise Tax Commissioner.

Dec. 5, 1941.

IN BANK:

Appeal from the Superior Court of Los Angeles County, Benjamin J. Scheinman, Judge.

Action by the Fifth Street Building against Charles J. McColgan, as Franchise Tax Commissioner, to recover franchise tax paid. From a judgment for plaintiff, defendant appeals.

Reversed, with instructions.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brookes, Deputy Attys. Gen., for appellant.

Flint & Mackay and Clark J. Milliron, all of Los Angeles, for respondent.

TRAYNOR, *Justice:*

On December 30, 1934, Walkers' Inc., a domestic corporation doing business in California, filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California. It was adjudicated a bankrupt, and a trustee in bankruptcy was appointed who carried on the business from December 31, 1934, until about July 26, 1938. On March 9, 1937, the trustee filed a franchise tax return under the Bank and Corporation Franchise Tax Act (Cal. Stats. 1929, p. 19 as amended by Cal. Stats. 1935, pp. 959, 995, 1245), and paid a franchise tax of $4,764.17 for the taxable year 1937. In 1938 Walkers' Inc., was discharged from bankruptcy. The trustee filed a claim, which was denied, for the refund of the 1937 franchise tax. By an order of the federal court plaintiff, Fifth Street Building, became the assignee of the claim for refund and brought suit for the recovery of the tax paid by the trustee. Both the plaintiff and defendant filed mo-

tions for judgment on the pleadings, and judgment was entered in favor of the plaintiff for the refund of the tax in question. From that judgment defendant has taken this appeal.

Plaintiff contends that the trustee in bankruptcy was not subject to the Bank and Corporation Franchise Tax Act, which imposes a tax on corporations doing business in the state for the privilege of exercising their corporate franchises therein. In plaintiff's view the corporation's franchise did not pass to the trustee but he carried on the business as an individual immune from the taxes applicable solely to corporations.

(1) This contention would revive an issue, once highly controversial, laid at rest by an act of Congress of June 18, 1934, 28 U. S. C. A. Sec. 124a. See United States *v.* Whitridge, 231 U. S. 144, 34 S. Ct. 24, 58 L. Ed. 159; Michigan *v.* Michigan Trust Co., 286 U. S. 334, 52 S. Ct. 512, 76 L. Ed. 1136; Reinecke *v.* Gardner, 279 U. S. 239, 48 S. Ct. 472, 72 L. Ed. 866; Bright *v.* State of Arkansas, 8 Cir., 249 F. 950; Kansas City *v.* Johnson, 8 Cir., 70 F. 2d. 360; In re Continental Candy Co., D. C., 291 F. 773; In re Century Mills Inc., D. C. 12 F. 2d. 292. The act of Congress provides: "Any receiver, liquidator, referee, trustee, or other officers or agent appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

(2) This language envisages precisely such situations as the present one. The trustee, appointed after June 18, 1934, by a United States Court, conducted the business theretofore carried on by Walkers' Inc., then subject to the franchise tax as it would have continued to be had it not gone into bankruptcy. The act of Congress makes it clear that the appointment of a trustee in bankruptcy by a federal court does not relieve a business of the state and local taxes to which it is normally subject. "What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating

the enterprise". Palmer *v.* Webster & Atlas Nat. Bank of Boston, 312 U. S. 156, 61 S. Ct. 542, 545, 85 L. Ed. 642; see, also, Philadelphia Co. et al. *v.* Dipple, 312 U. S. 168, 61 S. Ct. 538, 85 L. Ed. 651; Boteler *v.* Ingels, 308 U. S. 57, 60 S. Ct. 29, 84 L. Ed. 78; Thompson *v.* Louisiana, 8 Cir. 98 F. 2d. 108; In re Vicksburg Bridge & Terminal Co., D. C., 24 F. Supp. 123; International Shoe Co. *v.* Picard & Geismar, D. C. 30 F. Supp. 570; In re Kentucky Fuel Gas Corp. D. C. 37 F. Supp. 625; The Southern Cross, 2 Cir. 120 F. 2d. 466.

(3) It was settled in Boteler *v.* Ingels, supra, not only that a trustee in bankruptcy comes within the meaning of the act of Congress and cannot therefore escape the applicability of a state tax, but that the trusteeship can in no way militate against the effective enforcement of the tax. In that case a trustee in bankruptcy operated automobiles on the California highways without obtaining the licenses required by California laws or paying the state automobile license tax. The court upheld a penalty of 100 per cent, stating (208 U. S. 57, 60 S. Ct. 32, 84 L. Ed. 78): "* * * Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes 'the same as if such business (es) were conducted by an individual or corporation'. If businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty. * * * petitioner's contention would exempt a trustee operating a business in bankruptcy from this double tax liability which other delinquents must bear. A State would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment."

(4) There is no need to amend the Bank and Corporation Franchise Tax Act to specify that a trustee in bankruptcy conducting the business of a corporation shall be subject to the tax as if he were a corporation in order to insure that an intervening bankruptcy will not interrupt the application of the tax. Thompson *v.* Louisiana, supra. The Act of Congress already provides that state taxes are as

applicable to such a business as if it were conducted by a corporation, and thus gives to the trustee the status of a corporation for the purpose of the tax. That status is determined by Congress in the exercise of its plenary authority over the administration of a bankrupt's estate. Thompson *v.* Louisiana, supra; In re Landquist, 7 Cir., 70 F. 2d. 929. Congress creates the trusteeship, fixes the conditions of its existence and may provide, as in the act of 1934, that a trustee be regarded as of such a nature as to come within the range of state tax laws.

Plaintiff's complaint therefore does not state a cause of action and since amendment could be of no avail the judgment is reversed with instructions to enter judgment on the pleadings for the defendant.

Gibson, C. J., and Shenk, Curtis, Edmonds, Houser, and Carter, JJ., concurred.

APPENDIX "B".

Clark J. Milliron, 518 Fidelity Building, Los Angeles, California, MUtual 6134.

Flint & Mackay, 1232 Rowan Building, TRinity 3114.

Attorneys for Plaintiff.

Entered Sep. 18, 1940.

Docketed Sep. 18, 1940.

Book 1098, Page 288.

By M. Rosenswerg, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

No. 433295.

FIFTH STREET BUILDING, a corporation, *Plaintiff*,

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California, *Defendant*.

JUDGMENT

The defendant in the above entitled action having been served according to law with summons and complaint therein and having appeared therein by demurrer, and

said demurrer having been overruled, and said defendant having filed therein his answer, and the said plaintiff having duly moved the court for judgment on the pleadings in accordance with the prayer of the complaint, and said defendant having filed therein his objection to plaintiff's motion, and having moved the court for judgment on the pleadings, and which said motions were duly noticed, and were, by counsel for the respective parties, by stipulation submitted, upon order of the court, on the 20th day of August, 1940.

Whereupon, on the 31st day of August, 1940, said court granted the said motion of plaintiff, and denied the said motion of defendant, and ordered judgment accordingly.

Now Therefore, it is found that the defendant's answer does not raise any material issue and does not deny any material allegation contained in said complaint, and is sham, frivolous and wholly insufficient to constitute a defense to said action, or to entitle defendant to any equitable, legal or other relief and does not present anything, either by way of denial or by way of new matter or affirmative defense, in bar or defense of plaintiff's right to judgment as prayed, that all of the allegations of the complaint are true, that the complaint states a cause of action against the defendant, and that plaintiff is accordingly entitled to judgment on the pleadings, and

It is Hereby Ordered, Adjudged and Decreed that plaintiff Fifth Street Building, a corporation, have and recover of and from the defendant, Charles J. McColgan, as Franchise Tax Commissioner of the State of California, the sum of $4,764.17, together with interest on $2,382.09 from March 12, 1937, at the rate of 6% per annum, and interest on the sum of $2,382.08, at the rate of 6% per annum, from the 25 day of August, 1937, and together with plaintiff's costs hereby tax in the sum of $9.00.

Done in open court this 17th day of September, 1940.

B. J. SCHEINMAN,
Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

FIFTH STREET BUILDING, a corporation,

Appellant,

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California,

Appellee.

APPELLANT'S BRIEF

In Opposition to Appellee's Motion to Dismiss or Affirm and Statement Opposing Jurisdiction, and Statement in Opposition to Granting Writ of Certiorari.

Statement of Facts.

On December 30, 1934, Walker's, Inc., a California corporation, filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California, Central Division, and was thereupon adjudged a bankrupt. Thereafter, Wm. H. Moore, Jr., was duly appointed trustee in said bankruptcy estate, and remained said trustee during the period in controversy herein.

During the period in controversy herein, said trustee in bankruptcy, under authority of the aforesaid District Court, carried on the business theretofore conducted by the bankrupt corporation.

On March 9, 1937, the said trustee in bankruptcy filed a corporation franchise tax return under the provisions of Chapter 13 of the Statutes of California of 1929, known as the Bank and Corporation Franchise Tax Act, and paid franchise tax for the year 1937 in the amount of $4,764.17.

The bankrupt corporation, Walker's, Inc., was duly discharged by the bankruptcy court in the year 1936, and during the period in controversy herein was privileged to and did exercise its franchise as a corporation separate and independent from any business carried on by the aforesaid trustee in bankruptcy. Said trustee in bankruptcy did not operate any business under the franchise granted by the State of California to Walker's, Inc. Said business was carried on by said trustee under and by virtue of the authority granted by the aforesaid District Court, and under and by virtue of the bankruptcy laws of the United States of America.

The aforesaid trustee in bankruptcy duly filed a claim for refund of said 1937 franchise tax, which was denied.

Fifth Street Building, appellant herein, by order of the Federal Court, became the assignee of the claim for refund, and the owner of any right to a refund of the franchise tax paid by the trustee.

The appellant herein, as plaintiff, brought suit in the Superior Court of the state of California, in and for the county of Los Angeles, for the recovery of the franchise tax paid by said trustee. The appellee herein, as defendant, in said Superior Court, demurred to plaintiff's complaint. Defendant's demurrer was overruled and defendant answered. Defendant, in his answer, did not deny any of the material allegations in the complaint. Thereafter, motions for judgment on the pleadings were filed by both plaintiff and defendant, and thereafter judgment was rendered and entered in favor of the plaintiff and against the defendant for the refund of the aforesaid franchise tax.

Thereafter, appellee herein, as appellant, appealed from the judgment of said Superior Court to the Supreme Court of the state of California. Thereafter said Supreme Court reversed the said judgment of said Superior Court and made and entered its judgment in favor of said appellant, appellee herein, and against the respondent, appellant herein, for the amount of said franchise tax.

Thereafter said respondent, appellant herein, petitioned said Supreme Court for a rehearing, which was denied.

Thereafter, said appellant petitioned the Supreme Court of the state of California for its order granting an appeal to the Supreme Court of the United States, which petition was granted by the Chief Justice of said Supreme Court of the state of California.

ARGUMENT.

Appellee bases his motion to dismiss this appeal or to affirm the judgment below upon the following ground, to-wit: That *"the constitutional power of Congress to prescribe duties and obligations of trustees in bankruptcy, have been so thoroughly foreclosed by previous decisions of this court and other federal courts as to leave no debatable ground for attacking the decision of the Supreme Court of California, and therefore the questions presented are unsubstantial."* (Italics ours.)

The constitutional power of Congress to prescribe duties and obligations of trustees in bankruptcy has not, in this action, been, and is not now questioned. No question as to the constitutionality of such power in Congress has been made, or is, an issue in this case.

Appellee, having thus based his said motion upon a non-existent ground and upon a question which is not, and which has not at any time been, an issue in this case, his motion should be denied.

Appellee, however, presents an argument in support of his motion which is based upon grounds and questions other than the ground and question upon which he has specifically based his motion.

Appellee's argument in support of his motion, with the exceptions herein mentioned, goes to the merits of the case and not to the question of right to appeal or to the jurisdiction of this court to entertain the appeal of this case from the Supreme Court of the state of California. He cites no authority on the question of the right to appeal or on the question of the jurisdiction of this court to entertain this appeal; nor does he point out wherein the authorities cited by appellant in support of this appeal do not support the right of appeal in this case.

The Act of Congress of the United States of June 18, 1934, 28 U. S. C., Sec. 124(a), which appellant contends was misconstrued by the Supreme Court of the state of California in placing its improper construction upon the California Bank and Corporation Franchise Tax Act, insofar as it is pertinent to this case, reads as follows:

> "Any * * * trustee, * * * appointed by any United States Court who is authorized by said Court to conduct any business, shall from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

In his brief, appellee, after quoting from Sec. 124(a) of Title 28, U. S. Codes, states:

> "It is clear that the effect of this statute is not to impose a state tax but to withdraw restrictions theretofore thought to have been placed by the Bankruptcy Act on State power to tax."

And again:

> "The section merely removes a bar theretofore thought to have been placed by Congress itself on the exercise by the States of their reserved powers."

This admission is directly contrary to the decision of the California Supreme Court in this case.

We agree with appellee that Section 124(a) of Title 28, U. S. Codes, does not impose a tax and we also contend that this section does not affirmatively create a corporation out of a trustee, nor does it tax a trustee in bankruptcy for use of the corporation franchise which, by the provisions of the bankruptcy law does not pass to the

trustee, but remains with the bankrupt, as the facts in this case show.

The Supreme Court admits that the California Bank and Corporation Franchise Tax Act does not impose the tax in controversy. It says:

> "There is no need to amend the Bank and Corporation Franchise Tax Act to specify that a trustee in bankruptcy conducting the business of a corporation shall be subject to the tax *as if he were a corporation* in order to insure that an intervening bankruptcy will not interrupt the application of the tax. * * * The Act of Congress already provides that state taxes are as applicable to such a business *as if it were conducted by a corporation,* and thus *gives to the trustee the status of a corporation for the purpose of the tax.* That status is determined by Congress in the exercise of its plenary authority over the administration of a bankrupt's estate. * * *. Congress creates the trusteeship, fixes the conditions of its existence and may provide, as in the Act of 1934, that a trustee be regarded as of such a nature as to come within the range of state tax law." (Italics ours.)

The decision erroneously holds in simple language:

The state law does not impose the franchise tax on a trustee. The Act of Congress (Act of 1934) (28 U. S. C. 124(a)), affirmatively gives a trustee in bankruptcy the status of a corporation for the purpose of the franchise tax, and imposes a tax on the trustee as if he were a corporation.

By thus intermingling the incorrect construction of the Act of Congress with the State Statute, the Court holds the tax to be due.

The State Court alternatively based its decision upon the State Statute and upon the Federal Statute. These two are so interwoven that it is impossible to conclude that the judgment rests upon an independent interpretation of the state law. The decision rests upon an inseparable intermingling of the federal and state laws. The decision is therefore properly subject to appeal.

State Tax Commission of Utah v. Van Cott, 306 U. S. 511, 514, 83 L. Ed. 950, 952.

The facts, which are not in controversy, disclose that Walker's Inc., was adjudicated a bankrupt December 30, 1934, and was discharged from bankruptcy in 1936, and that during the entire period in controversy did exercise its franchise separate and independent from any business carried on by the trustee.

Appellee admits that "the tax herein involved was not measured in any part by any income derived by the discharged corporation from the use of that franchise."

The undisputed facts also show that the trustee in bankruptcy did not operate any business under the franchise of the corporation.

The Supreme Court of California, by the construction placed upon the federal law in this case, holds the trustee liable for the corporation franchise tax, by reason of the provisions of the federal law. The construction placed upon the state law by the Supreme Court of California and the Supreme Court of the United States in other cases, holds the bankrupt corporation liable for the franchise tax because it retains the franchise and continues to exist and operate only by reason of the franchise.

The Pacific Co., Ltd. v. Johnson, 212 Cal. 148, 154-5, 298 Pac. 489, 492.

The judgment of the Supreme Court of California, above cited, was affirmed by the Supreme Court of the United States, wherein was used the following language:

> "This distinction, so often and consistently reaffirmed, is but a recognition that the franchise, the privilege of doing business in corporate form, which is a legitimate subject of taxation, does not cease to be such because it is exercised in the acquisition and enjoyment of non-taxables. The distinction is one of substance, not of form, and has been so recently discussed in *Educational Films Corp. v. Ward* that it need not be elaborated here. It suffices to say that the tax immunity extended to property *qua* property does not embrace a special privilege, the corporate franchise, otherwise taxable, merely because the value of the corporate property or net income is included in an equitable measure of the enjoyment of the privilege. The owner may enjoy his exempt property free of tax, but if he asks and receives from the state the benefit of a taxable privilege as the implement of that enjoyment, he must bear the burden of the tax which the state exacts as its price."
>
> *Pacific Company, Ltd., v. Johnson*, 285 U. S. 480, 490, 76 L. Ed. 893, 896-7.

> "It is a tax for the privilege of exercising a corporate franchise."
>
> *Fullerton Oil Co. v. Johnson*, 2 Cal. (2d) 162, 176;
>
> *Filoli, Inc. v. Johnson*, 4 Cal. (2d) 662, 664.

To the same effect, see also:

> *Educational Films Corp. v. Ward*, 282 U. S. 379, 388, 75 L. ed. 400, 404-5.

There are, therefore, two entities held by the Supreme Court of the state of California to be subject to the franchise tax on the same franchise, *i. e.*, the corporation and the trustee of the bankrupt estate.

The California Bank and Corporation Franchise Tax, General Laws of California, Act 8488, Section 4, Subsection (3) reads as follows:

> "(3) CORPORATIONS OTHER THAN FINANCIAL DOING BUSINESS IN THIS STATE TO PAY TAX. MINIMUM TAX. With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, *for the privilege of exercising its corporate franchises within this State,* a tax according to or measured by its net income, to be computed, in the manner hereinafter provided at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually to the State, for the said privilege, a minimum tax of twenty-five dollars." (Italics ours.)
>
> Act 8488, Sec. 4, Subsec. (3).

If this Court feels that a consideration of the merits is necessary at this time and that the entire record should be examined, it is respectfully submitted that all of the cases cited by the appellee or by the State Supreme Court are reviewed and the authorities to the contrary are set forth in the Appellant's Petition for Rehearing in the Supreme Court of California, which Petition is a part of the transcript herein.

Appellee quotes one sentence from *Palmer v. Webster and Atlas Nat. Bank*, 312 U. S. 156, a case under Section 77 of the Bankruptcy Act, as follows:

> "What Congress intended was that a business *in receivership*, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise." (Italics ours.)

He then adds:

> "Certainly this statement cannot be reconciled with appellant's theory."

Respondent failed to quote the next sentence in the decision, which reads:

> "In the light of this purpose, the Act does not impose upon the New Haven trustees the obligation to pay taxes arising out of the conduct of the business of Old Colony or Boston and Providence."
>
> *Palmer v. Webster and Atlas Nat. Bank*, 312 U. S. 156, 163; 85 L. ed. 642, 648.

By direct analogy to the present case the Federal Act (28 U. S. C. 124(a)), does not impose upon a trustee in bankruptcy the obligation to pay a franchise tax arising out of the use by the bankrupt corporation of its corporate franchise, which it retained and used outside of bankruptcy and to which franchise the trustee did not have title and which he did not use.

The theory under which the intent of Congress is attempted to be read into the state law is directly contrary to the decision of this Court in *Palmer v. Massachusetts*, 308 U. S. 79, 83, 84 L. ed. 93, 97.

In the last paragraph of the Argument for Dismissal of the Appeal (p. 5, lines 10 to 15, typewritten draft) appellee makes a statement as to what the contentions of the appellant are, as follows:

> "Appellant also argues that the California Bank and Corporation Franchise Tax Act as construed by the California Supreme Court is unconstitutional because it invades the reserved powers of the States and because it imposes a Federal tax for the benefit of California. Undoubtedly appellant made this argument inadvertently, as it is erroneous on its face."

This statement is incorrect. Neither the Supreme Court nor the appellant have anywhere stated that the California law imposes a federal tax.

The Supreme Court of California held that the federal law, imposed a state tax.

Appellant contends that the construction of the federal law by the California Supreme Court holding that the federal law imposes the state tax is a misconstruction of the federal law, and that such misconstruction, if read into the California law, is in violation of the Constitution of the United States, in that Congress cannot impose a tax for the benefit of the state.

Answering the Statement in Opposition to Granting Writ of Certiorari.

Appellee states two grounds for his opposition, both of which are based on his statement that the California Supreme Court decision is in accord with decisions of the Circuit Court and of this Court.

Three cases are cited as follows:

Thompson v. State of Louisiana, 98 Fed. (2d) 108.

This was a case of a trustee appointed under Section 77 of the Bankruptcy Act (11 U. S. C. 205).

The Court held that it was the duty of the trustee, and he was required by the Court, to protect the corporate franchise and he was, therefore, liable for the franchise tax. (98 Fed. (2d) 110.) This decision does not support appellee.

Boteler v. Ingels, 308 U. S. 57, 84 L. ed. 78.

This case is one where a trustee in bankruptcy operated vehicles; which act was subject to a tax in California.

The Court held that the trustee was subject to penalties for violation of the state law, the same as any other person operating vehicles.

There is nothing whatsoever in the case which is in point on the question of jurisdiction or on the issues in this case.

Lastly he cites:

Palmer v. Webster and Atlas Nat. Bank, 312 U. S. 156, 85 L. ed. 642.

We have quoted from this decision at p. 10, *supra,* and have shown that the decision does not support appellee's contention.

The decision of the California Supreme Court is in conflict with the cases cited, as well as the following:

U. S. v. Whitridge, 231 U. S. 144, 58 L. ed. 159;

Reinicke v. Gardner, 277 U. S. 239, 242, 72 L. ed. 866, 867;

In re Continental Candy Co., 291 Fed. 773,

and other cases cited in appellant's "Petition for Rehearing Before the State Supreme Court."

It is respectfully submitted that the motion of appellee should be denied and that this appeal be granted or, if the Court feels that this case should more properly be considered on a Writ of Certiorari, as suggested by appellee, then the appellant respectfully requests that said Writ be issued.

Respectfully submitted,

CLARK J. MILLIRON,

Attorney for Appellant.

FILED
MAY 16 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1239

FIFTH STREET BUILDING, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

EARL WARREN,
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H. H. LINNEY,
Assistant Attorney General of California,
VALENTINE BROOKS,
Deputy Attorney General of California,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1239

FIFTH STREET BUILDING, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA.

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION, AND STATEMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

May it Please the Court:

The California State Franchise Tax Commissioner moves the Court to dismiss this appeal or to affirm the judgment below for the following reason:

1. There is no substantial Federal question presented as a basis of jurisdiction in this Court, because the questions presented, relating to the constitutional power of Congress to prescribe duties and obligations of trustees in bank-

ruptcy, have been so thoroughly foreclosed by previous decisions of this Court and other Federal courts as to leave no debatable ground for attacking the decision of the Supreme Court of California, and therefore the questions presented are unsubstantial.

Wherefore, the California State Franchise Tax Commissioner moves the Court to dismiss the appeal in this cause for lack of a substantial Federal question or, in the alternative, to affirm the judgment of the Supreme Court of California from which this appeal was taken, for the reason that the questions presented are foreclosed by prior decisions of this Court.

Argument in Support of Motion.

Statement of the Case.

This cause involves the constitutionality of the California Bank and Corporation Franchise Tax Act in so far as it has been construed to impose a tax on a trustee in bankruptcy who carries on the business of a bankrupt corporation. An Act of Congress (48 Stats. 993, 28 U. S. C. A. Sec. 124a) authorizes such taxation and that provision as applied by the California Supreme Court is challenged by appellant as violative of two provisions of the Federal Constitution because its effect is to impose a State tax.

The facts of the case are, briefly restated, that a California corporation became bankrupt in 1934 and a trustee was appointed by a proper Federal court. This trustee, during the calendar year 1937, carried on the business of the bankrupt corporation and paid a State franchise tax for 1937 measured by the net income of the preceding year. It is also a fact that in 1936 the bankrupt corporation was discharged and thereafter exercised its franchise in some undisclosed manner and degree, but as the tax herein involved was not measured in any part by any income derived

by the discharged corporation from the use of that franchise, the fact is believed to be without significance.

The ground on which 28 U. S. C. Sec. 124a and the California Act are attacked is without substance.

Sec. 124a of Title 28, United States Code, reads in so far as pertinent as follows:

> "Any receiver, liquidator, referee, trustee, or other officer or agent appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

It is clear that the effect of this statute is not to impose a State tax but to withdraw restrictions theretofore thought to have been placed by the Bankruptcy Act on State power to tax.

Prior to the enactment of section 124a, the decisions had concluded that a trustee in bankruptcy was not subject to State franchise taxes to which the bankrupt corporation had been subject. This conclusion was based on a determination that the trustee was separate and apart from the corporation and was not a continuation of the corporation. The latter determination was commonly expressed in such statements as "the trustee takes title to the property in his own name" and "the trustee does not operate under the franchise of the corporation but in his own right." These statements were not based on constitutional provisions but were based on implications drawn from the enactments of Congress, including the Bankruptcy Act. We believe it obvious that Congress could withdraw these implications and could make the trustee operate under the franchise and in the name of the bankrupt corporation. We believe it also obvious that if the power of the States

to tax the trustee should be thought to be inhibited by a possible conflict with the Federal bankruptcy power, Congress could declare that the payment of State taxes would not impede the exercise of the bankruptcy power, and thereby remove the limitation on State taxation.

Had Congress expressed itself in the manner suggested in the preceding paragraph, any contention that such enactments were unconstitutional because they imposed State taxes and interfered with the reserve power of the States would have been frivolous, since the sole effect of the enactments would have been to remove implied limitations on the powers of the States. Yet the effect of section 124a is precisely the same: the section merely removes a bar theretofore thought to have been placed by Congress itself on the exercise by the States of their reserved powers.

The constitutionality of section 124a is also shown by *Gillis* v. *Calif.*, 293 U. S. 62, suggesting a different approach to the instant problem. There this Court upheld section 124, Title 28, United States Code (the companion section to section 124a) against comparable attacks, pointing out that Congress had power to restrict the powers of the United States District Courts and to deny them the authority to empower appointees to function in disregard of State laws. Thus Congress can withdraw from its bankruptcy courts power to appoint trustees with capacity and authority to function with immunity from those State tax laws which would have reached the bankrupt.

This Court has twice considered section 124a, once in *Boteler* v. *Ingels*, 308 U. S. 57, and once in the companion cases of *Palmer* v. *Webster & Atlas Nat. Bk.*, 312 U. S. 156, and *Philadelphia Co.* v. *Dipple*, 312 U. S. 168. The former case held that the section compelled a recalcitrant trustee to pay a penalty because he failed to pay State automobile taxes when due, a result not consistent with

the theory that the section is unconstitutional. In the *Palmer* case, involving a State franchise tax, although this Court held that the particular tax was not encompassed by the section since it was not the insolvent's tax, this Court stated that:

> "What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise."

Certainly this statement cannot be reconciled with appellant's theory.

The precise problem herein presented, including the contention that the section, as construed by the court below, is unconstitutional, was met and disposed of in *Thompson* v. *Louisiana* (C. C. A. 8) 98 Fed. (2d) 108. That decision upheld the validity of the section as applied to a trustee in a section 77 (section 205, Title 11, U. S. Code) proceeding. As section 205 (c) (2) provides in part that "The trustee or trustees * * * shall have all the title and shall exercise * * * all the powers of a trustee appointed pursuant to section 72," and as trustees in bankruptcy are appointed pursuant to section 72, that decision may be seen to be direct authority supporting the decision in this case.

Appellant also argues that the California Bank and Corporation Franchise Tax Act as construed by the California Supreme Court is unconstitutional because it invades the reserved powers of the States and because it imposes a Federal tax for the benefit of California. Undoubtedly appellant made this argument inadvertently, as it is erroneous on its face.

Statement in Opposition to Granting Writ of Certiorari.

May it Please the Court:

The California State Franchise Tax Commissioner hereby opposes the Court's granting a writ of certiorari if the Court treat the appeal as a petition for a writ under section 344 (c) of Title 28, United States Code. The grounds for this opposition are:

1. The decision below is in accord with the only other decision on the subject, thus there is no conflict of decision;

2. The decision below is consistent with the decisions and the reasons in support thereof of this Court, thus the decision of the California Supreme Court is correct and will not give rise to uncertainty.

Argument.

On parges 10 and 11 of the typewritten Statement in Support of Jurisdiction, appellant challenges the decision below as being in conflict with the proper interpretation of section 124a. As this is merely another way of saying that appellant urges that the court below has placed an erroneous construction on section 124a, this contention seems to be one not properly within the scope of section 344 (a) of Title 28, but properly within the scope of section 344 (b) of that title, dealing with certiorari. If this be correct, this Court will, under section 344 (c), treat the appeal herein as a petition for writ of certiorari. However, no good reason exists for issuing a writ herein. In addition to being a correct decision, the decision of the California Supreme Court reaches the same conclusion as that of the Eighth Circuit Court of Appeals in *Thompson* v. *Louisiana, supra.* Furthermore, the decision is sug-

gested by *Boteler* v. *Ingels, supra,* and applies section 124a in a manner consistent with its scope and purpose as outlined by this Court in *Palmer* v. *Webster & Atlas Nat. Bk., supra.* Thus a decision by this Court is not necessary either to remove uncertainty as to the correct construction of section 124a or to cure a lack of uniformity of decision.

Respectfully submitted,

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Attorney General of California,
H. H. LINNEY,
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No. 1239. FIFTH STREET BUILDING *v.* MCCOLGAN, FRANCHISE TAX COMMISSIONER. Appeal from the Supreme Court of California. June 1, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended, 28 U. S. C., § 344 (a). Treating the papers whereon the appeal was allowed as an application for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C., § 344 (c), certiorari is denied. *Mr. Clark J. Milliron* for appellant. *Messrs. Earl Warren,* Attorney General of California, *H. H. Linney* and *Valentine Brooks* for appellee. Reported below: 19 Cal. 2d 143, 119 P. 2d 729.